IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 82736-2
Respondent,	)	
	)	En Banc
v.	)	
	)	
KEVIN L. MONDAY, JR.,	)	
	)	
Petitioner.	)	Filed June 9, 2011
_____	)	

CHAMBERS, J. — Kevin L. Monday Jr. was convicted of one count of first degree murder and two counts of first degree assault stemming from a shooting in Pioneer Square, Seattle, Washington. We granted review limited to two issues: whether prosecutorial misconduct deprived Monday of a fair trial and whether imposition of firearm enhancements violated Monday's jury trial right. Finding that his trial was fatally tainted by prosecutorial misconduct, we reverse.

FACTS AND PROCEDURAL HISTORY

A street musician was playing drums in Seattle's popular Pioneer Square early one Sunday morning in April 2006. He had mounted a digital video camera on his equipment. The camera captured a confrontation between several men, including one in a distinctive, long red shirt. The

confrontation seemed to break up. Then, the red shirted man suddenly pulled out and rapidly fired a pistol as he walked backward and then as he turned and ran.

Francisco Green was shot four times. Two other men were also shot, though both survived. Green died upon arrival at the nearby Harborview Medical Center.

Once he was home, the street musician, who had wisely dropped to the ground when the shooting started, realized he had recorded the shooting. He gave the recording to the police that same day. Shortly after the shooting, a witness stopped an officer on the street to offer a description of the shooter and his very recent location. Following that tip, the officer found Antonio Saunders. Out of Saunders's hearing, the witness confirmed Saunders was the man he believed had committed the shooting, and the officer arrested Saunders for violating probation. Ultimately, Saunders told one of the homicide detectives investigating the murder that he saw Monday fire his gun at Green. Another witness picked Monday and another man out of a photomontage as possible shooters. Many of the other witnesses were more reluctant to cooperate or gave inconsistent responses to investigators. One witness gave a physical description of the shooter.

Monday was arrested three weeks after the murder. He was wearing a red shirt and hat that were strikingly similar to the ones in the video. He initially told the investigators that he had not been to Pioneer Square for years. After being shown some still shots from the video of people he knew,

Monday admitted he had been to Pioneer Square recently, admitted he had gotten into a fight, and admitted that he heard a gun being fired. He denied that he had fired a gun himself. When the police showed Monday a picture of himself in a photographic still from the musician's video, Monday acknowledged it was him.

Not long afterward, the police suggested that they had found Monday's DNA (deoxyribonucleic acid) and fingerprints on shell casing recovered at the scene. This was not, in fact, true. Shortly afterward, Monday began to cry and said that "I wasn't trying to kill that man, I didn't mean to take his life." Verbatim Report of Proceedings (VRP) (May 29, 2007) at 32-33. Police searched Monday's home and found .40 caliber bullet cartridges and a gun holster. The gun was not recovered.

Monday was charged with one count of first degree murder and two counts of first degree assault, all while armed with a handgun, and second degree unlawful possession of a firearm. Trial began in April 2007 and lasted a month. During his opening statement, Prosecutor James Konat told the jury that the State takes great measures to ensure that no one is falsely accused or falsely convicted. Monday's counsel objected on the grounds that the State is not supposed to vouch for the credibility of its witnesses or its case. Judge Michael Hayden sustained the objection and stressed that "at no time during the trial will anyone be expressing their personal views as to the guilt or their personal views as to the truth-telling of anyone who takes the witness stand." VRP (May 10, 2007) at 8. The judge also reminded counsel that it was not

their place to give their views on the "credibility of a witness or the guilt of anyone." *Id.* at 7. Judge Hayden denied Monday's motion for a mistrial. He invited Monday to submit a curative instruction but acknowledged that "would simply highlight what was said." *Id*.

Witness credibility was particularly at issue because many of the State's witnesses were not enthusiastic proponents of the State's case. For example, Saunders testified he had only identified Monday as the shooter because he thought Monday had blamed him. Saunders's former girl friend, Adonijah Sykes, had also told investigators that Monday was the shooter. On the stand, she testified that she had lied to police investigators.

During Sykes's second day of testimony, the following exchange took place between her and the prosecuting attorney:[1]

> Q. . . . . And would you agree or disagree with the notion that there is a code on the streets that you don't talk to the po-leese?
>
> A. I mean, that's what some people say. That's what some people go by.
>
> Q. Well, can you help us understand who these some people are?
>
> A. I'm saying -- I'm just saying that's how some people is. Some people talk to the police, some don't.
>
> Q. And you're one of those that don't, right?
>
> A. I'm saying – well, I don't – police ain't my friends or nothing.
>
> . . . .

[1] The court reporter transcribed Konat's use of the word "police" as "po-leese." A different court reporter transcribed the first day of Sykes's testimony and consistently transcribed the word as "police."

> Q. Does that mean that you're one of those people who don't talk to the police?
>
> A. No, sometimes I don't talk to the po-leese. I mean, they got a question or something to ask me, I answer. I don't talk to them.

VRP (May 22, 2007) at 19. Monday did not immediately object to either the prosecutor's line of questioning or his potentially derogatory pronunciation. The examination continued:

> Q. Let me ask you this about your conversation with the po-leese.
>
> When did you figure out that that guy that got shot when you were on the corner on April 22nd, 2006[,] when did you find out that he was dead?
>
> A. A couple weeks later.
>
> Q. Really.
>
> A. Yeah.
>
> Mr. MINOR [defense counsel]: Objection, your honor.

Id. at 19-20. The judge asked, "Are you objecting to his tone of voice?" *Id.* at 20. When counsel demurred and said he was objecting to the comment itself, the judge said: "I think you're really objecting to the tone of voice that he's giving us. And I will ask him to try to ask your questions, let the jury decide whether this witness should be believed or not." *Id.* The prosecutor thanked the judge and continued. Not long after, the prosecutor used the term again:

> Q. And fair to say that you didn't want your boyfriend to go to jail?
>
> A. No.
>
> Q. Right? And that's one of the reasons that you stayed away and tried to avoid the po-leese, right?

> A. I just didn't want to have nothing to do with them.
> Q. I mean, to be -- to go back over your testimony yesterday for just one moment, you never called the police and told them you saw what happened down there, did you?
> A. No. A lot of people was down there didn't call the police.
> Q. That's right. And that's what I was asking you about, there's a code on the streets that you don't call the po-leese, right?

Id. at 22-23.

While Judge Hayden was clear that the prosecutor must refrain from any comments on the credibility of the witnesses, he was not without sympathy. He noted that "virtually every lay witness has been very reticent to testify in this case, and the memory of virtually every lay witness has had significant holes in places where one would not expect that they would have memory lapses." VRP (May 23, 2007) at 98.

Despite the court's earlier admonishment that it was not the State's role to vouch for the credibility of the State's witnesses or its case, in closing, the prosecutor argued:

> Seventeen years and eleven months ago yesterday, I signed on, I signed on to serve at the pleasure of Norman K. Maleng. I never imagined in a million years I would get to try as many murder cases as I have in the last 15 years, and I never imagined I would ever get to try one, a doozy, like this one. Seventeen years and about ten months ago I started going to training sessions in the King County prosecutor's office on Saturday mornings that we just dreaded when we could be playing golf. . . . And two things stood out for me very shortly into my career as a prosecutor, two tenets that all good prosecutors, I think, believe. One is that when you have got a

> really, really, really strong case, it's hard to come up with something really, really, really compelling to say. And the other is that the word of a criminal defendant is inherently unreliable. Both of those tenets have proven true time and time again over the years, and they have done it specifically in this case over the last five weeks -- four weeks.
>
> I never imagined when I signed on to serve at the pleasure of Norm Maleng, this won't be the last murder case I will try, but it is the last one I will try under his name. I imagined I would call eight witnesses who simply will not or cannot bring themselves to admit what cannot be denied.

VRP (May 30, 2007) at 26-27. The prosecutor contended that Green was killed "for no reason. Francisco Green got killed because this messed up American male was trying to prove his macho. He stuck his nose in a fight that didn't have one damn thing to do with him." *Id.* at 28. The prosecutor acknowledged he was being selective in what part of his witnesses' testimony he wanted the jury to credit. He explained:

> [T]he only thing that can explain to you the reasons why witness after witness after witness is called to this stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don't testify against black folk. You don't snitch to the police. And whether it was the guy who was down there helping Francisco Green, trying to keep this killer off of him, or whether it was the people that were working with this killer to try and get to Francisco Green, none of them could bring themselves to recognize what cannot be denied.

Id. at 29-30. He returned to this point again and again throughout his closing argument. *E.g., id.* at 35 ("And there is only one conceivable explanation for this, and it is called code."); *id.* at 37 ("all of those witnesses are protecting Kevin Monday. Why? It's the same thing I'm going to say over and over

before I sit down. Code. It's all about the code.").

The jury found Monday guilty of one count of first degree murder and two counts of first degree assault. The jury also answered "yes" to each of the special verdict form questions asking whether Monday committed the crimes with a firearm.

Monday appealed on numerous grounds, including that the prosecutor made a blatant and inappropriate appeal to racial prejudice and undermined the credibility of African American witnesses based on their race. The Court of Appeals affirmed Monday's conviction and sentence finding, among other things, that the prosecutor made a blatant appeal to racial prejudice but that any error was harmless under this court's established jurisprudence. *State v. Monday,* noted at 147 Wn. App. 1049, 2008 WL 5330824. We granted review limited to whether prosecutorial misconduct deprived Monday of a fair trial and whether imposition of firearm enhancements violated Monday's jury trial right. *State v. Monday,* 166 Wn.2d 1010, 210 P.3d 1018 (2009).

ANALYSIS

1. Prosecutorial Misconduct

Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)). Instead of examining improper conduct in isolation, we determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence

presented, "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Generally the prosecutor's improper comments are prejudicial "'only where "there is a *substantial likelihood* the misconduct affected the jury's verdict."'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *McKenzie*, 157 Wn.2d at 52 (quoting *Brown*, 132 Wn.2d at 561)). This has been the standard in this state for at least 40 years. *See State v. Music*, 79 Wn.2d 699, 714-15, 489 P.2d 159 (1971), *judgment vacated in part by,* 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972). It is not clear from *Music* where this standard came from.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).[2]

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[2] Over a 100 years old, *Fielding*'s words bear repeating again:

> [A] public prosecutor . . . is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.* at 71. Thus, a prosecutor must function within boundaries while zealously seeking justice. *Id.* A prosecutor gravely violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions.

Monday contends Prosecutor Konat injected racial prejudice into the trial proceedings by asserting that black witnesses are unreliable and using derogatory language toward a black witness, saying that "black folk don't testify against black folk." VRP (May 30, 2007) at 29-30. He contends that the prosecutor made a variety of improper comments during opening statements and closing argument, including referencing his personal credibility, invoking popular former King County Prosecutor Norm Maleng, attacking Monday's credibility, the credibility of the State's own witnesses, and commenting on the strength of the State's case. Monday also contends the prosecutor acted improperly by stating that all good prosecutors believe "the word of a criminal defendant is inherently unreliable" and by adding that it was true in the present case. *Id.* at 26-27. The State concedes that some of these statements were improper but argues that any error was either not preserved by objection or was harmless given the overwhelming evidence against Monday.

Fielding, 158 N.Y. at 547, *quoted with approval in Case*, 49 Wn.2d at 70-71.

A "'[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." *Case,* 49 Wn.2d at 71 (citing *State v. Susan,* 152 Wash. 365, 278 P. 149 (1929)). Turning first to the general issue of the State commenting on the credibility of its witnesses or its case, we agree with the Court of Appeals and Monday that the State crossed that line. It violates our jurisprudence for a prosecutor, a representative of the State, to comment on the credibility of the witnesses or the guilt and veracity of the accused.

> [A]n attorney shall not
>
> > Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
>
> Applying the predecessor to this rule, this court has noted that it is just as reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). Here, the prosecutor clearly violated CPR DR 7-106(C)(4) by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused. First, he called the petitioner a liar no less than four times. Next, the prosecutor stated that the defense counsel did not have a case, and that the petitioner was clearly a "murder two". Finally, he implied that the defense witnesses should not be believed because they were from out of town and drove fancy cars.
>
> These statements suggest not the dispassionate proceedings of an American jury trial, but the impassioned arguments of a character from Camus' "The Stranger".

State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (quoting former Code of Professional Responsibility DR 7-106(C)(4)).[3] Plainly, the State violated these precepts. Monday has shown that the prosecutor's comments were improper.

Monday also contends, correctly, that the State committed improper conduct by injecting racial prejudice into the trial proceedings. The State repeatedly invoked an alleged African American, antisnitch code to discount the credibility of his own witnesses. First, we find no support or justification in the record to attribute this code to "black folk" only. Commentators suggest the "no snitching" movement is very broad. Prosecutor Konat intentionally and improperly imputed this antisnitch code to black persons only. Second, this functioned as an attempt to discount several witnesses' testimony on the basis of race alone. It is deeply troubling that an experienced prosecutor who, by his own account, had been a prosecutor for 18 years would resort to such tactics. "[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *State v. Dhaliwal,* 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring).

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[3] Since *Reed,* the Code of Professional Responsibility has been replaced by the Rules of Professional Conduct. DR 7-106(C)(4) is substantially similar to the current RPC 3.4(e), which states that a lawyer shall not

> in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Neither was it an isolated appeal to racism. Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias. *See generally* Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism,* 92 Colum. L. Rev. 1212, 1222-23 & nn.67, 71 (1992) (citing Joel Kovel, White Racism: A Psychohistory 32 (1984); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 Rutgers L. Rev. 673 (1985); Reynolds Farley, *Trends in Racial Inequalities: Have the Gains of the 1960s Disappeared in the 1970s?*, 42 Am. Soc. Rev. 189, 206 (1977)); *see also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences,* 65 N.Y.U. L. Rev. 479, 545-51 (1990). Among other things, the prosecutor in this case, on direct examination of a witness, began referring to the "police" as "po-leese." Monday contends, and we agree, that the only reason to use the word "po-leese" was to subtly, and likely deliberately, call to the jury's attention that the witness was African American and to emphasis the prosecutor's contention that "black folk don't testify against black folk." VRP (May 30, 2007) at 29. This conduct was highly improper.

The State contends that even if the conduct was improper, Monday still bears the burden of showing a substantial likelihood that the misconduct affected the verdict, and, it contends, given the overwhelming evidence of Monday's guilt, this is a burden he has not met. It also notes that Monday's

counsel did not object and that we have held that without a timely objection, reversal is not required "unless the conduct is 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" *State v. Warren*, 165 Wn.2d 17, 43, 195 P.3d 940 (2008) (quoting *Brown*, 132 Wn.2d at 561). We have also said that a defendant's failure to object to a prosecutor's remarks when they are made "strongly suggests" that the remark did not appear critically prejudicial in the trial's context. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Similarly, objecting to improper conduct but failing to request a curative instruction does not warrant reversal if an instruction could have cured the prejudice. *Warren*, 165 Wn.2d at 26 (citing *Yates,* 161 Wn.2d at 774).

The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. The Bill of Rights sought to guarantee certain fundamental rights, including the right to a fair and impartial trial. The constitutional promise of an "impartial jury trial" commands jury indifference to race. If justice is not equal for all, it is not justice. The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless. Because appeals by a prosecutor to racial bias necessarily seek to single out one racial

minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Such a test exists: constitutional harmless error. *E.g., State v. Evans,* 154 Wn.2d 438, 454, 114 P.3d 627 (2005) (citing *State v. Brown,* 147 Wn.2d 330, 340, 58 P.3d 889 (2002)); *see also State v. Evans,* 96 Wn.2d 1, 4, 633 P.2d 83 (1981). Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.[4]

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[4] The dissent is of the view that the videotape is overwhelming evidence of guilt. We respectfully disagree that the video alone is dispositive. While the videotape clearly establishes that Monday was the shooter, it does not by itself establish premeditation, nor does it rule out some defenses. The State certainly did not think the video was enough; otherwise, this trial would not have stretched on for weeks. More importantly, our task today is not to determine whether there was sufficient evidence to sustain the jury's verdict. Our task today is to determine whether Monday is entitled to relief because the prosecutor made improper, racially charged comments.

Given our holding, we do not reach whether the firearms enhancement was properly imposed.

In this case, we cannot say beyond a reasonable doubt that the error did not contribute to the verdicts. The prosecutor's misconduct tainted nearly every lay witness's testimony. It planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant. Under the circumstances, we cannot say that the misconduct did not affect the jury's verdict.[5]

CONCLUSION

It was improper for the prosecutor to cast doubt on the credibility of the witnesses based on their race. We cannot say beyond a reasonable doubt that the impropriety did not affect jury's work. We

[5] The dissent contends that we have disregarded the rights of the victim and his family under article I, section 35 of our state constitution. When the government resorts to appeals to racial bias to achieve its ends, all of society suffers including victims. Further, we fail to see how article I, section 35 is implicated in our opinion today. Article I, section 35 provides:

> Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.
>
> Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

reverse.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Richard B. Sanders, Justice Pro Tem.

Justice Gerry L. Alexander

Justice Susan Owens